



Signed: August 11, 2008

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 07-43462 EDJ
AVONELLE KIRWAN-GADSBY, Chapter 7
Debtor./

MEMORANDUM RE: FEE APPLICATION

The court has reviewed the objection by Creditor Roger L. Miller Retirement Trust ("Creditor") to the fees requested by R. Kenneth Bauer, counsel for the above debtor ("Bauer"). Although the objection raises several minor points, the most serious objection is that Bauer knew or should have known that this case should not have been filed as a chapter 11, and that the debtor, with Bauer's assistance, filed it solely for purposes of delay.

The court has considered the objection, the comments of counsel at oral argument, and the files in this case. The court will overrule the objection.

The debtor's Schedule A (Real Property) filed at the outset of

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1 the case listed five parcels of real property, four of which showed
2 a scheduled equity. The debtor scheduled one parcel as having an
3 equity of \$350,000. Thus, according to the debtor's schedules, the
4 debtor did appear to have reasonable prospects for a successful
5 chapter 11.

6 This is borne out by the fact that, according to the Creditor
7 and Bauer,¹ Lois Brady, trustee in bankruptcy, has a sale pending
8 that may bring \$300,000 into the estate in addition to the \$32,000
9 she already holds.

10 The test for determining the allowability of fees is not the a
11 strict "benefit to the estate" test, based on hindsight. Rather,
12 the test is whether the fees appeared reasonable and necessary at
13 the time that they were incurred. See, e.g., In re Auto Parts Club,
14 211 B.R. 29, 34-35 (9th Cir. BAP 1997). See also In re Mednet, 251
15 B.R. 103 (9th Cir. BAP 2000). Thus, even though the sale by the
16 chapter 7 trustee has not closed (or even if it fails to close for
17 some reason), the court believes that Bauer's filing of the chapter
18 11 case was reasonable and necessary based on the facts then known
19 to him.

20 The Creditor also argues that Bauer expended too much time
21 performing certain tasks, especially the preparation of the debtor's
22 schedules. Bauer, however, has explained to the court's
23 satisfaction why the time he expended was needed.

25 ¹See letter to the court dated August 7, 2008 from
26 Creditor's counsel, Marlene Weinstein, and Bauer.

1 The court will therefore issue its order overruling the
2 objection and allowing Bauer's fees and costs as requested.

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